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LAW LIBRARY OF CONGRESS**GERMANY****LEGAL ASPECTS OF EXHIBITIONS OF PRESERVED HUMAN CORPSES***Executive Summary*

In 2003, the courts of Munich were instrumental in putting an end to the exhibitions of Hagens' preserved human corpses in that city. The Administrative Court of Munich and, on appeal for injunctive relief, the Administrative Court of Bavaria reasoned that preserved corpses were still corpses and therefore subject to the Bavarian burial laws which require corpses to be buried, unless they are used for medical or scientific purposes. These courts also held that the Constitutional guarantee of human dignity disallows the display of human corpses in sensational or artistic poses and that human corpses must be buried unless it is proven that the deceased had given his consent to another form of disposal, a consent that still is limited by public policy considerations. In 2006, however, Hagens reestablished his operations in Germany by opening a museum of cadavers and a corpse preservation workshop the city of Guben, in eastern Germany. Among the legal basis for these operations is a decision of the Administrative Court of Baden-Württemberg that considers Hagens' operations an anatomical institute.

I. Hagens' Exhibits of Corpses

Dr. Guenter von Hagens, a formerly East German physician who later resided in western Germany, developed a preservation process for human corpses that he named "plastination" or "plasticization." This process involves the removal of body fluids from the corpse and their replacement with polymers and resins. Hagens preserved many corpses and parts thereof in this manner and called them "plastinates." He put together exhibitions of these objects that he showed in Germany and other countries, allegedly for educational purposes.

From 1992 until approximately 2004, his operations were headquartered in the German city of Heidelberg, but he also carried out his operations in other parts of the world, and among these were facilities in the People's Republic of China and in Kyrgyzstan, where he procured corpses from prisons and unidentified sources and engaged in the mass production of preserved corpses and corpse parts. He also maintained a commercial enterprise and a bank account in the Swiss city of Basel. In Germany he exhibited preserved bodies and body parts in various cities and some 4.5 million visitors had viewed these exhibitions there. The first German exhibition was in the city of Mannheim, in North-Rhine Westphalia, in 1997, and the last one was in Frankfurt in the state of Hesse, in 2004, shortly after he had run into difficulties with the courts of Munich in 2003. Recently Hagens moved his headquarter to the German city of Guben, near the Polish border.

From the time of his first exhibitions, Hagens' activities have engendered much criticism. Many commentators objected to his activities on the grounds of public morality, alleging that these exhibitions violated the human dignity of the corpses and that their purpose was sensational and commercial, not educational.¹ In 2003 accusations surfaced in the press alleging that Hagens had obtained corpses in

¹ Among the protesters were the Catholic and Protestant Churches in Germany. See Evangelischer Stadtkirchenrat, *Ausstellung Körperwelten*, at the official website of the German Lutheran Church, <http://www.ekir.de> (last visited June 15, 2007).

illegal and immoral ways, including corpses of executed Chinese prisoners² and of prisoners and individuals who had disappeared in Kyrgyzstan.³ In February 13, 2003, in Munich and in Hamburg, Hagens allowed his corpses to be shown in a particularly macabre display by allowing a journalist to place them randomly at bus stops and in other public places in life-like situations and having them thus photographed and published by a pictorial magazine. The Regional Court of Munich granted a search warrant⁴ to investigate these activities for possibly amounting to a disturbance of the peace of the dead;⁵ the prosecutor of Hamburg was also investigating the situation.⁶ In 2005, however, the Federal Constitutional Court held that the warrant of the Munich Regional Court was unconstitutional because it was excessive, it extended to obviously innocent staff members of the journal, and was also disproportional in view of the high value of the freedom of the press and the comparatively low interest in prosecution in this case.⁷

The exhibitions in the cities of Munich and Stuttgart led to more significant court actions against the Hagens operations. In 2003, the regional court of Munich upheld an administrative prohibition of a planned exhibition.⁸ Thereupon Hagens requested injunctive relief from the Bavarian Administrative Court, asking for permission to show his exhibition while the case was being decided on the merits. He obtained this injunctive relief in part by being allowed to show many but not all the objects while the case was pending.⁹ As the case progressed, however, it became apparent that Hagens would not win it and he therefore terminated the exhibition in Munich and withdrew the case. The deciding court then held him responsible for paying the entire cost of the proceedings, on the grounds that he would have lost on the merits. Thus, the exhibition in Munich was not a financial success for Hagens.¹⁰ Moreover, the Munich decisions impressed the authorities in Frankfurt who thereupon wondered if they had been tricked into giving permission under false pretenses.¹¹

Hagens was more successful in the courts of Stuttgart, where the administrative authorities had restricted the exhibition by disallowing many objects, similarly to the Munich showing. In 2004, the Administrative Court of Stuttgart retroactively upheld this administrative decision,¹² but on appeal the Administrative Court of Baden-Württemberg reversed and held that under the laws of the state of Baden-Württemberg, the corpses in Hagens' exhibition did not require a permit for being exempted from the burial requirement, because Hagens' operation qualified as an anatomical institute.¹³ In the daily press, the results in Stuttgart were ascribed to a poor defense by the city's attorneys.¹⁴

² Suspicion concerning Chinese prisoners arose from records of the Hagen factory in China, showing receipts of corpses with holes in the head and removed organs at a time of mass executions. *See Dr. von Hagens' schreckliche Geschäfte*, HAMBURGER ABENDBLATT (Jan. 19, 2004), at LEXIS/library NEWS/fileZEITNG.

³ *Leichen im Keller*, STERN 28 (Nov. 6, 2003), at LEXIS/library NEWS/fileZeitng.

⁴ Decision of Landesgericht München, March 19, 2003, docket number 5 Qs 13/2003, at JURIS, a commercial database.

⁵ *Infra* note 23 and accompanying text.

⁶ *Die Nacht der lebenden Leichen*, TAZ, DIE TAGESZEITUNG 21 (Oct. 14, 2003)) at LEXIS/library NEWS/fileZEITNG.

⁷ Bundesverfassungsgericht, chamber decision of Feb. 1, 2005, docket number 1 BvR 2019/03, at JURIS.

⁸ Verwaltungsgericht [VG] München, February 18, 2003, docket no. M 10 S 03.545, at JURIS. The German text of this decision is included as Attachment A.

⁹ Bayerischer Verwaltungsgerichtshof, Feb. 21, 2003, docket no. 4 CS 03.462, at JURIS. The German text of this decision is included as Attachment B.

¹⁰ *Hagens muss für Prozess bluten*, STUTTGARTER ZEITUNG 17 ((May 25, 2004), at LEXIS/library NEWS/fileZEITNG.

¹¹ *Obskurer Handel mit Leichen*, TAGES-ANZEIGER Jan. 23, 2004, at LEXIS/library NEWS/FILEZEITNG.

¹² VG Stuttgart, March 16, 2004, docket no. 6 K 2954/03, at JURIS.

¹³ Verwaltungsgerichtshof Baden-Württemberg, Nov. 29, 2005, docket no. 1 S 1161/04, at JURIS.

¹⁴ "die Stadt macht vor Gericht oft keine gute Figur," STUTTGARTER ZEITUNG 17 (May 25, 2004).

However, the adverse publicity engendered by Hagens' operations in China and Kyrgyzstan and by his bizarre nightly outings of corpses in Hamburg and Munich marked a turning point in the success of his exhibitions in Germany, and also led the Swiss authorities to close his bank account in Basel. In Germany, he also lost several court cases in which he was prohibited from calling himself "Professor," a title he had obtained in China.¹⁵ Nevertheless, since the fall of 2006 he has again been firmly established in Germany. In November 2006, he opened a permanent facility in the city of Guben, in eastern Germany. The new operation is part cadaver museum and part workshop for the processing of corpses. It is encouraged by the authorities of the town, because it brings employment to the depressed region.¹⁶ When deciding whether to grant a permit for this operation, the involved authorities were influenced by the decision of the Administrative Court of Baden-Württemberg that viewed Hagens' operations as being an anatomical institute.¹⁷

II. Court Decisions

The Decision of the Administrative Court of Munich¹⁸

In January 2003, Hagens requested a permit from the administrative authorities of Munich for an exhibition of some 200 plastinates, some of them entire corpses and others parts of bodies. These were to be arranged according to anatomical principles and were to be presented together with educational information. The Bavarian administrative authorities informed the petitioner that they intended to prohibit the exhibition as being in violation of the Bavarian burial laws and granted two hearings to discuss the matter.

In these hearings, the petitioner argued that the exhibition did not amount to commercial dealings with human corpses because the exhibits no longer were corpses within the meaning of the Bavarian burial laws¹⁹; they were comparable to skeletons, consisted up to seventy percent as plastics, and were anonymous. According to the petitioners, the exhibits were anatomical preparations and as such exempt from the application of the Bavarian burial laws; there even existed a customs number for "plastinates," thus indicating that they were commercial objects and not corpses. Moreover, petitioner argued, even if the exhibits were corpses, the exhibition could not be prohibited because the otherwise governing mandatory time limits for the burial of human corpses do not apply to specimens used for scientific purposes. Further, they argued that the constitutional guarantee of freedom of scholarship and research²⁰ required the Bavarian authorities to grant a permit for the exhibition.

The Munich authorities issued a decision on February 13, prohibiting the exhibition for being in violation of articles 1 and 5 of the Bavarian Burial Law and of section 19 of the Bavarian Burial Regulation.²¹ The administrative decision held that the "plastinates" were human corpses and that the exhibitions were not scholarly or scientific endeavors calling for an exemption from the burial laws but instead were sensational and commercial events. The authorities also held that the Bavarian state has the duty to protect corpses because of the Constitutional guarantee of human dignity that is a counterweight

¹⁵ P. Beucker, *Der chinesische Hautabzieher*, TAZ, DIE TAGESZEITUNG, Jun. 24, 2006, at LEXIS/library NEWS/fileZEITNG.

¹⁶ Preserved-Corpse Factory Opens in Eastern Germany, Spiegel Online (Nov. 16, 2006, at LEXIS/library NEWS/fileZEITNG.

¹⁷ *Innenministerium prüft Leichenpraeparator-Plaene*, BERLINER ZEITUNG (Dec. 9, 2005), at LEXIS/library NEWS/fileZEITNG.

¹⁸ Verwaltungsgericht [VG] München, *supra* note 8.

¹⁹ See *infra* notes 27 and 28 and accompanying text.

²⁰ See *infra* note 23 and accompanying text.

²¹ See *infra* note 28.

to the constitutional freedoms of science and the arts. The authorities denied that the objects were property of the Hagens operation because corpses cannot be owned by anyone.

The Hagens operation appealed against this decision to the Administrative Court of Munich and asked for injunctive relief at the same time, to allow for the opening of the exhibition while the case was being decided. Among the arguments of this plaintiff was a declaration that all the exhibits came from bodies whose donors had agreed to the “plastination” during their lifetime. On the side of the defendants, briefs were submitted by the Bavarian regional government.

The Court decided the case on February 18, 2003 by prohibiting the exhibition and by denying injunctive relief. The Court held that “plastinates” were corpses because they were dead human bodies that had not as yet decomposed to a skeletal state. Therefore, the Court concluded, the “plastinates” had to be buried in accordance with the law. The Court explained that even anonymous corpses remain corpses, as for instance, no longer recognizable victims of explosions who also must be buried. Body parts of corpses are not corpses and they do not need to be buried but they must also find their final rest in a burial place after they are no longer needed for scientific purposes.

The Court also held that the main principle of Bavarian burial law is the disposal of corpses and other human remains in a manner that lives up to sanitary requirements while being in conformity with the dignity of the deceased and with public moral sentiment. According to the Court, an exception from the burial laws for scientific purposes was not indicated for the exhibition because of its sensational make-up, as demonstrated by the emphasis on exhibits of entire corpses in spectacular or artistic poses, and as demonstrated by the publication on February 13, 2007 of photographs of corpses scattered through the city in life-like situations.²² The exception for scientific exhibitions was also denied because, according to Bavarian law, traveling expositions do not qualify as scientific environments.

On the balance between the freedom of science and human dignity the Court held that Hagens’ operations may or may not partake in the constitutional guarantee of freedom of scientific expression, even though he also pursued commercial goals and was not part of the academic world. The Court, however, did not need to make this determination because freedom of science is subordinated to the constitutional principle of human dignity, and this includes the dignity of the deceased and the sentiments of the living. Human dignity is the highest constitutional tenet and it prohibits the degradation of a human being to a mere object or to treatment that questions his individuality. Human dignity is an absolute value that cannot viewed in relativity to prevailing social conditions. With respect to the deceased, the Bavarian burial laws implement this principle through protective provisions.

On the donors’ permission given during their lifetime, to have their bodies “plastinated,” the Court held that proof of permission had not been given for all objects. Moreover, the permission form that was shown on the Internet did not speak of exhibitions, but merely of scientific and educational uses in appropriate institutions. Finally, even if unlimited permission had been given by the donors to have their bodies exhibited in any manner, those permissions do not eliminate the Bavarian burial laws, which may limit a donor’s right to dispose over his body by principles of public morality.

Decision of the Bavarian Administrative Court²³

On appeal, the Bavarian Administrative Court granted injunctive relief by allowing the Munich exhibition to be shown while the decision on the merits was pending. The Court insisted, however, on two modifications by disallowing the showing of one object entitled “Bolting Horse with Rider,” and by prohibiting the sale of food, beverages and souvenirs on the premises of the exhibition. Prior to the

²² Die Nacht, *supra* note 6.

²³ Bayerischer Verwaltungsgerichtshof, *supra* note 9.

decision, the appellants had already agreed to omit several exhibits that showed entire corpses in artistic poses, among these were exhibit designated as “Prayer,” “Harry Potter,” “Goalie,” “Totally Expanded Body,” and “Man in a Drawer.”

On the legal issues, the Court held that the “plastinated” bodies were corpses, even though the applied preservation processes prevent their decay, and even though they probably could not be identified individually. The Court also held, however, that a summary review of the issues did not justify the denial of injunctive relief, because the plaintiff had promised to show permission documents from all the donors. The Court also held that the Bavarian burial laws not only serve sanitation purposes but also protect the dignity and feelings of the living and the dead, within the meaning of the Constitutional protection of human dignity.

The Court did not deny that the exhibition had some educational purpose and merit, but again referred to the balance between human dignity and scientific freedom. The Court held that the showing of anatomical details through the exhibits did not violate human dignity, but the use of the “plastinated” bodies to create objects of art was offensive, because corpses cannot be used as a means of artistic expression. In analogy to the principle of *res extra commercium* that traditionally applies to corpses, the Court called corpses a *res extra artem* because they could not be used as a medium for artistic expression. Because of these considerations, no “plastinates” that had been arranged artistically were allowed to be shown.

III. Constitutional Provisions

Article 1, paragraph 1 of the Constitution:²⁴

Article 1 (Human dignity)

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 5, paragraph 3 of the Constitution:

(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the Constitution.

IV. Federal law

Section 168 of the Criminal Code:²⁵

Sec. 168. Disturbing the Peace of the Dead

(1) Whoever without authorization takes away the body or parts of the body of a deceased person, a dead fetus or parts thereof, or the ashes of a deceased person from the custody of the person entitled thereto, or whoever commits insulting mischief thereon, shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever destroys or damages a place for laying-in-state, burial site or public place for remembering the dead, or whoever commits insulting mischief there, shall be similarly punished.

²⁴ Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl at 1, as amended. The up-to-date translations are from PRESS AND INFORMATION OFFICE OF THE FEDERAL GOVERNMENT, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Bonn, 1999).

²⁵ Strafgesetzbuch, repromulgated Nov. 13, 1998, BGBl I at 3322, as amended. The up-to-date translation is from S. THAMAN, THE GERMAN PENAL CODE (Buffalo, 2002).

(3) An attempt is punishable.

It is noteworthy that according to the majority opinion in Germany the process of plastination of a human body is not in and of itself violation of section 168. This was asserted in a brief of the Prosecutor in the city of Heidelberg, where Hagens had his headquarters. The Prosecutor investigated his operations but terminated the investigations with a decision not to charge Hagens.²⁶

V. Bavarian Burial Law

Bavarian Burial Act²⁷

Art. 1. Burial

(1) Every corpse must be buried, either by being laid to rest in a grave (internment) or through incineration in a crematory and the laying to rest of the ashy remains that are placed in a solid and sealed urn in burial place (cremation), or through incineration in a crematory and the laying to rest of the urn from a ship on the high seas (burial at sea). Corpses and ashy remains of deceased must be laid to rest in cemeteries, unless otherwise permitted by this Act.

(2) The intentions of the deceased, or in case of a deceased below the age of 16 or lacking in legal capacity, those of the legal guardian shall be taken into consideration in determining the manner, place, and execution of the burial, to the extent that these intentions are not contrary to public policy. If the intentions of the deceased or his guardian cannot be proven, the intentions of the next of kin who according to article 15, paragraph 2, number 1 is responsible for the burial shall be taken into consideration.

Art. 5. General Requirements

Corpses and the ashy remains of deceased must be dealt with in a manner that does not endanger public safety and order, in particular public health and the requirements of criminal law, and that does not violate the dignity of the deceased and the moral sentiments of the public. This applies in particular to burial, salvage, safekeeping, placing in a coffin, laying out in state, transportation, and removal from a grave (excavation).

Art. 6. Stillbirths, Miscarriages of a Fetus, Parts of Bodies and Corpses

(1) The provisions of this Act and the regulations issued on the basis of this Act and concerning corpses and the ashy remains of the deceased that have been shall apply by analog to a fetus with a weight of at least 500 grams that was stillborn or that died during birth (stillbirth). A fetus with a weight of less than 500 gram that was stillborn or that died during birth (miscarried fetus) may be buried. If miscarried fetuses are not buried according to sentence 2, they must, to the extent and for as long as they are not needed as evidence, be laid to rest at a burial place, or, if this is not possible or cannot be reasonably expected, the holder of custody over them must collect them in a suitable manner and must lay them to rest at a burial place within certain predetermined periods. Miscarried fetuses may also be incinerated in a manner that lives up to hygienic requirements and moral sentiments and thereupon be laid to rest at a burial site. The holder of custody must notify persons with rights of disposal immediately and in an

²⁶ H. TRÖNDLE & T. FISCHER, STRAFGESETZBUCH 1025 (München, 2006).

²⁷ Bestattungsgesetz, 3 BAYERISCHE RECHTSSAMMLUNG 452, as last amended by Gesetz, Jul. 26, 2005, BAYERISCHES GESETZ- UND VERORDNUNGSBLATT [BayGVBl] 287 (2005), available at the official website <http://by.juris.de/by/gesamt/BestattGBY.htm>. The translations are from the author of this report.

appropriate manner of their rights of burial according to sentence 2 and of their responsibilities according to sentence 3. If the person with the right of disposal agrees, miscarried fetuses may also be used for medical or scientific purposes. As soon as miscarried fetuses are no longer used for this purpose, the must be laid to rest in a burial place in accordance with sentences 3 and 4, unless they are buried according to sentence 2.

(1) Paragraph 1, sentences 2 through 7 shall apply by analogy to fetuses and embryos resulting from abortions.

(3) The person with rights of disposal over parts of bodies and corpses, or, if that person cannot be ascertained or is not available, the holder of custody, must dispose of the body or corpse parts in a seemly and hygienically safe manner, to the extent and for as long as they are not used for medical or scientific purposes or are needed as evidence.

Section 19 of the Bavarian Burial Regulation²⁸

Sec. 19. Time limits for Burial and Transportation

(1) A corpse must be buried within 96 hours after death has been pronounced, or it must be transported within this time limit, if it is intended to be transported according to this Regulation. If a corpse arrives at the place of burial after this time limit has expired, it must be buried there without delay. Sundays, Saturdays, and public holidays shall not be counted in determining the time limit. If the documents required for burial or transportation cannot be obtained in a timely manner, burial or transportation shall be carried out immediately as soon as the documents are presented.

(2) The local community may grant exemptions from paragraph 1, if there is no reason to fear that (public) health would thereby be endangered. The local community may order an earlier burial or transportation to avert an endangerment of (public) health.

(3) Paragraphs 1 and 2 shall not apply if corpses

1. are brought to a hospital or scientific facility for medical or scientific purposes; or
2. are the subject of criminal investigations.

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²⁸ Verordnung zur Durchführung des Bestattungsgesetzes (Bestattungsverordnung), Mar. 1, 2001 Bay 92, as amended, available at the official website http://by.juris.de/by/gesamt/BestattG_BY.htm.